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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

MARSHALL SPIEGEL,

Petitioner,

v.

STATE FARM FIRE AND CASUALTY CO.,

Respondent.

Petition For Writ Of Certiorari To The Illinois Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner purchased an insurance policy from Respondent that provided coverage against assault and battery charges, among other things. When petitioner was charged with assault and battery in a criminal complaint, respondent refused to cover the costs of petitioner's successful defense. The lower courts held that insurance coverage does not extend to a criminal charge because a criminal charge is not a suit for damages. In so holding the lower courts announced a rule of law that the imposition of restitution in a criminal case is not compensation for damages but rather is exclusively a penalty imposed against a criminal defendant. The question presented here is: Is restitution in a criminal case exclusively penal in nature?

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PETITION FOR WRIT OF CERTIORARI

Marshall Spiegel ("Spiegel") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Illinois Appellate Court to resolve the issue of whether restitution in a criminal case is exclusively punishment.

OPINIONS BELOW

The opinion of the Illinois Court of Appeals that gives rise to this petition is reprinted in Appendix A hereto ("App. A") at page A-1. The Illinois Supreme Court denied the Petition for Leave to Appeal. App. B, A-9.

JURISDICTION

On December 29, 1995 the Illinois Appellate Court issued an opinion affirming the trial court's grant of summary judgment in favor of Respondent. Petitioner timely filed a Petition for Leave to Appeal to the Illinois Supreme Court which was denied on April 13, 1996. This petition has been filed within 90 days of denial of petitioner's petition for leave to appeal to the Illinois Supreme Court.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257.

STATEMENT OF THE CASE

Petitioner Spiegel sought coverage for the defense of a criminal battery complaint under his State Farm umbrella insurance policy which provided for insurance coverage if the insured became legally obligated to pay damages for an accident resulting in personal injury during the policy period.[1] The term "personal injury" as defined under the policy included assault and battery. State Farm refused to defend Spiegel, contending that the insurance policy did not cover battery. Spiegel was subsequently acquitted of the battery charge.

The trial court granted summary judgment to State Farm, ruling that the insurance policy provided only for coverage against damages, and thus did not apply to defense of a criminal case. Spiegel appealed, pointing out that under Illinois law a criminal defendant may be liable for restitution[2] and that the damages awarded as restitution are equivalent to damages in a civil case.[3] The Appellate Court affirmed the grant of summary judgment and

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[1] Coverage for assault and battery was a standard coverage item commonly included in insurance policies by most carriers.

[2] Had Spiegel been convicted in the criminal case, restitution would have been mandatory because of the age of the complaining witness.

[3] 730 ILCS §5/5-5-6 provides that a sentencing judge may order that a defendant pay restitution, and, where the victim is 65 or older, the judge *must* order restitution. The same section of the Illinois criminal code provides that the amount of restitution is to be determined by the "actual out-of-pocket expenses, losses, damages, and injuries suffered by the victim . . . . " 730 ILCS §5/5-5-6(b). The order of restitution is enforceable as a civil judgment for damages. 730 ILCS §5/5-6(m).

the Illinois Supreme Court refused to grant Spiegel leave to appeal.

REASONS FOR GRANTING THE WRIT

The opinion of the lower courts was based upon a holding that an award of restitution is not "damages" as the term is used in the insurance policy, which limits coverage to situations in which the insured may be required to pay damages.

The holding in this case by the courts below that an order of restitution is not an award of damages is in conflict with legislative intent underlying the restitution statute and existing precedent which has construed the restitution statute as providing an avenue for victims to recover civil damages from convicted criminals.

The availability of criminal restitution to provide civil damages to a victim is discussed in *People v. Mitchell*, 241 Ill.App.3d 1094, 610 N.E.2d 794, 797 (4 Dist. 1993). The court stated: "We conclude that section 5-5-6 of the Code basically allows for a court order which at least partially substitutes for civil relief in favor of the injured party or parties." In *People v. Nasser*, 223 Ill.App.3d 400, 410, 584 N.E.2d 1010, 1016 (1991) it was held that the legislature intended the restitution provisions of the Illinois criminal code to be a vehicle for a victim to recover monetary damages from the assailant. The court stated "we believe trial courts have a duty, to the extent possible, to order restitution to benefit victims so that they can avoid the bother, expense, and delay too often present in the civil justice system." In *Benedick v. Mohr*, 233

Ill.App.3d 903, 600 N.E.2d 63, 68 (5th Dist. 1992) the Court held that an order of restitution triggers the doctrine of collateral estoppel regarding the issue of damages in a subsequent civil case brought on the facts underlying the criminal complaint. The Court stated, "[w]e see no reason to force plaintiff to go through the expense of a trial so that defendant can attempt to obtain an inconsistent judgment from another trier of fact or to escape her obligation to reimburse plaintiff fully for the money she has stolen. Defendant has had her day in court and she is precluded from relitigating the same factual issue over and over."

Clearly, an order of restitution is an award of "damages" under Illinois law. Thus, because there was a possibility of coverage, all exclusions, conditions, or provisions which tend to defeat liability must be construed most favorably to the insured. *Elco Industries, Inc. v. Liberty Mut. Ins.* Co., 90 Ill.App.3d 1106, 414 N.E.2d 41 (1st. Dist. 1980); *Standard Mutual Insurance Co. v. General Casualty Cos.*, 171 Ill.App.3d 758, 764, 525 N.E.2d 965, 969 (1988). In short, the insurance company was obligated to provide coverage to Spiegel because there was a possibility of coverage.[4]

The rule of law announced by the Illinois courts in this case is that restitution is purely punishment. Carried to its logical extreme, this rule of law could be cited as a basis for affording double jeopardy protection to a criminal defendant who is later sued for restitutionary damages. This argument would be available because

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[4] State Farm subsequently changed its policy to eliminate coverage for assault and battery.

restitution has been held to be a substitute for a claim for civil damages. If restitution is exclusively penal in nature, then the subsequent suit for restitutionary damages could be alleged to be a second punishment for the same offense. This result would be in conflict with this Court's recent holding that civil forfeitures do not constitute punishment for purposes of the double jeopardy clause. *United States v. Ursery*, No. 95-345 (June 24, 1996).

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Marshall Spiegel
Petitioner pro se

APPENDIX

ILLINOIS APPELLATE COURT

FIFTH DIVISION

December 29, 1995

No. 1-94-3753

MARSHALL SPIEGEL, Plaintiff-Appellant, v. STATE FARM FIRE AND CASUALTY COMPANY, Defendant-Appellee.	)	Appeal from the Circuit Court of Cook County. Honorable Albert Green, Judge Presiding.

JUSTICE McNULTY delivered the opinion of the court:

Plaintiff Marshall Spiegel appeals from a trial court order granting summary judgment in favor of defendant State Farm Fire and Casualty Company (State Farm) in plaintiff's declaratory judgment action. We affirm.

Plaintiff was involved in an altercation with his neighbors, as a result of which he was charged with criminal battery. Plaintiff sought coverage for the defense of the criminal charge under the State Farm umbrella insurance policy that had been issued to him. State Farm denied coverage on the basis that the battery was based on criminal intent, and the policy excluded intentional acts from coverage. Plaintiff was later acquitted of the battery charge.

Plaintiff filed a declaratory judgment action against State Farm, seeking a declaration that State Farm improperly denied coverage for plaintiff's defense of the criminal charge. The trial court granted State Farm's motion

for summary judgment, holding that the State Farm policy did not provide coverage to defend against the criminal complaint filed against plaintiff because the criminal complaint was not an action for damages. Plaintiff appeals, contending that the trial court erred in determining that the criminal battery charge was excluded from coverage on the basis that it was not an action for damages and was an intentional act.

An insurer is obligated to defend those actions where the complaint alleges facts potentially within the coverage of the policy, even if the allegations are groundless, false or fraudulent. (*Thornton v. Paul* (1978), 74 Ill. 2d 132, 384 N.E.2d 335). Here, however, plaintiff has failed to show any facts demonstrating potential coverage.

The State Farm policy provides that, "If you are legally obligated to pay damages for a loss, we will pay your net loss minus the retained limit." The policy defines "loss" as "an accident that results in personal injury or property damage during the policy period" and "net loss" as "the amount you are legally obligated to pay as damages for personal injury or property damage." "Personal injury" is defined under the policy as "bodily harm, sickness, disease shock, mental anguish or mental injury," "false arrest, false imprisonment, wrongful eviction, wrongful detention, malicious prosecution or humiliation," "libel, slander, defamation of character or invasion of rights of privacy" and "assault and battery."

Plaintiff seeks to recover defense costs from State Farm on the basis of the policy language providing coverage for battery. State Farm claims and the trial court agreed that the although the policy provides coverage for

damages resulting from a battery, the criminal charges brought against plaintiff do not seek the recovery of damages. In *Shelter Mutual Insurance Co. v. Bailey* (1987), 160 Ill. App. 3d 146, 513 N.E.2d 490, a criminal battery charge was brought against the insured, and the insured sought reimbursement of defense fees from the insurer. The court found that the insurer had no duty to defend, stating:

> "[O]nly suits for damages are to be defended under the policies involved in the instant case. A criminal complaint does not seek damages. It is penal in nature. Furthermore, the automobile liability and homeowner's insurance policies in the instant case provide that the 'Company shall defend any suit alleging such bodily injury or property damage and seeking damages.' " (*Shelter*, 160 Ill. App. 3d at 156.)

Plaintiff asks us to depart from the rule set forth in *Shelter* on the basis that the Uniform Code of Corrections (Code) provides that a sentencing judge may order that a defendant pay restitution, and in cases where the victim is 65 or older, the judge must order restitution. (730 ILCS 5/5-5-6 (West 1994).) Plaintiff claims that restitution is comparable to damages since the Code provides that the amount of restitution is to be determined by the "actual out-of-pocket expenses, losses, damages, and injuries suffered by the victim" (730 ILCS 5/5-5-6(b) (West 1994)) and the order of restitution is enforceable as a civil judgment for damages (730 ILCS 5/5-5-6(m) (West 1994)).

Plaintiff has produced no evidence suggesting that restitution was sought in the criminal battery complaint that was filed against him. Plaintiff did not provide a

copy of the criminal complaint to State Farm when requesting defense and coverage, nor has he provided the court with a copy of the complaint. An appellant has a duty to present the reviewing court with a complete record, and any doubts arising from an incomplete record are therefore resolved against the appellant. (*Firkus v. Firkus* (1990), 200 Ill. App. 3d 982, 558 N.E.2d 554.) We do not address the issue of whether restitution constitutes damages under plaintiff's insurance policy with State Farm. Because plaintiff has not shown us that restitution was even a possibility in the criminal case, he has shown no potential coverage under the State Farm policy.

The State Farm policy also excludes coverage for personal injury or property damage which is either intended or expected by plaintiff. The offense of battery is defined in the Illinois Criminal Code of 1961 as follows:

> "A person commits battery if he intentionally or knowingly without legal justification and by any means, (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual." (720 ILCS 5/12-3 (West 1994).)

If a complaint alleges only that a battery was committed intentionally and does not also allege negligent conduct, the intentional acts exclusion would preclude coverage. (See *Farmers Automobile Insurance Association v. Medina* (1975), 29 Ill. App. 3d 224, 329 N.E.2d 430.) There is no allegation that plaintiff had been charged with anything other than criminal battery. This charge of intentional conduct is therefore excluded from coverage under the State Farm policy and clearly shows that State Farm had

no duty to defend plaintiff against the criminal charge that had been brought against him.

Accordingly, for the reasons set forth above, the trial court order granting summary judgment in favor of State Farm is affirmed.

Affirmed.

COUSINS, P.J., concurs.

T. O'BRIEN, J., specially concurs.

T. O'BRIEN, J., specially concurring.

I concur in the result reached by the majority, but believe that the issue of whether restitution constitutes damages under plaintiff's insurance policy ought to be addressed.

Notwithstanding the fact that plaintiff has produced no evidence suggesting restitution was actually sought in the criminal battery complaint, I believe restitution imposed for a violation of the Illinois Criminal Code does not constitute "damages" within the meaning of plaintiff's insurance policy as a matter of law.

7505/5-5-6(b) provides:

> In fixing the amount of restitution to be paid in cash . . . the court shall assess the actual out of pocket expenses, losses, damages and injuries suffered by the victim . . . provided that in no event shall restitution be ordered to be paid on account of pain and suffering.

While "out of pocket expenses, losses, damages and injuries suffered by the victim . . . " may suggest some

sort of economic loss equal to damages, one must look to the reason for the imposition of an order of restitution.

The Illinois Criminal Code (730 ILCS 5/5-5-6) sets forth the circumstances under which a court can order restitution.

> In all *convictions* for *offenses* in *violation of the Criminal Code of* 1961 [750 ILCS 5/1-1, et seq.] . . . committed against any person 65 years of age or older in which the person received injury . . . as a result of the *criminal act* of the defendant . . . the court shall order restitution as provided in this Section. In all other cases, the court shall at the *sentence hearing* determine whether restitution is an *appropriate sentence* to be imposed on each defendant *convicted* of an *offense.* (Emphasis added.)

As previously noted, the statute authorizes, when appropriate, restitution "as a result of *convictions* for offenses. . . . " It further speaks in terms of [determining] at the sentencing hearing . . . whether restitution is an appropriate *sentence* to be imposed on each defendant *convicted* of an *offense.* When the foregoing language is read together, I believe it demonstrates a legislative intent to make restitution a penalty for the commission of a criminal offense and not merely a substitute for civil damages. Words such as "convictions", "offenses", and "sentencing hearing" do not connote a forum where the ultimate disposition is meant to be an order for civil damages. Since restitution in the context of the above language connotes a penalty or punishment for a criminal offense, I believe it would be against public policy to either indemnify or defend an insured who was prosecuted for a criminal offense.

While no Illinois case precisely addresses the issue that indemnification cannot be had for the performance of a criminal act, the principle is otherwise not the subject of serious dispute.

In *Shew & Brotherton v. Southern Fire & Casualty Co. & Dredell County*, 307 N.C. 438, 298 S.E.2d 380, an insured sought coverage for reimbursement of money he was ordered to pay the county for damage to its property resulting from various traffic charges as well as misdemeanor assault. In denying coverage, the North Carolina Supreme Court held:

> As an insurer has no legal obligation to defend a criminal proceeding brought against an insured arising out of the operation of an automobile causing injury or damages, see 6C J. Appleman, Insurance Law and Practice Section 4431 (Buckley ed. 1979), so no obligation arises from the disposition of the criminal proceeding. Moreover, it is a basic proposition of public policy, requiring no citation of supporting authority, that an insured is not allowed to profit from his own wrongdoing. To require the [insurer defendant company] to reimburse [insured plaintiffs] for the amount ordered as restitution or to hold that the [insurer defendant company] was legally obligated to pay the amount to [plaintiff/insured's victim] would be tantamount to condoning insurance against the results and penalties of one's own criminal acts. This is against public policy. See 1 Couch on Insurance 2d Section 1:36 (2d ed. 1959); see also 7 Blashfield Automobile Law and Practice Section 291.1 (3d ed. 1966).

In light of the above analysis, I would find that neither a duty to defend nor indemnify exists under the plaintiff's policy as a matter of law.

ILLINOIS SUPREME COURT
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April 3, 1996

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No. 80538 – Marshall Spiegel, petitioner, v. State Farm Fire and Casualty Company, respondent. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

Bilandic, C.J., took no part.

The mandate of this Court will issue to the Appellate Court on April 25, 1996.